

IN THE FEDERAL SHARIAT COURT

(Appellate Jurisdiction)

PRESENT:

MR. JUSTICE ABDUL WAHEED SIDDIQUI

Criminal Appeal No.82/I of 1999

Aminur Rahman @ Malangai s/o Ali Rahman r/o Village Kunda Distt: Swabi	.....	Apellant
	Versus	
The State	.....	Respondent
Counsel for the appellant	.....	Malik Rab Nawaz Noon, Advocate
Counsel for the State	.....	Mr.Ejaz Muhammad Khan Addl.Advocate General NWFP
FIR No Date and Police Station	.....	564 dated 21-12-1997 P.S Zaida Swabi
Date of Judgment of the trial Court	.....	31-5-1999
Date of Institution	.....	5-6-1999
Date of hearing	.....	7-7-1999
Date of decision	.....	7-7-1999

JUDGMENT:

ABDUL WAHEED SIDDIQUI, J:- Appellant has assailed a judgment delivered by the Court of Sessions Judge, Swabi on 31-05-1999 whereby he has been convicted under Section 10(3) of the Offence of Zina (Enforcement of Hudood) Ordinance 1979, hereafter to be referred to as the said Ordinance, and has been sentenced to R.I for 4 years and whipping of 30 stripes. He has also been convicted under Section 452 P.P.C and sentenced to R.I for one year and fine of Rs:5000/- or in default to further S.I for 6 months. He has also been convicted under Section 506 P.P.C and sentenced to R.I for one year and fine of Rs:5000/- or in default to S.I for 6 months. The amount of fine under both the counts if recovered from the convict shall be paid to the victim Mst.Zakia as compensation. The sentences under all the three counts shall run concurrently. Benefit of Section 382-B Cr.P.C has also been extended to the appellant.

2. Story of the prosecution, in brief, is that one Mst.Zakia (PW-2), appeared at police station Zaida, District Swabi accompanied with her father Saeedul Hasan (PW-3) on 21-12-1997 at 1830 hours and stated that on the same date at about 1600 hours she was all alone in the house as her parents alongwith

all the other members of the family had gone to Zaida in connection with her betrothal. At that time appellant scalded upon the wall of the house and entered the house. On point of pistol he made her to remain silent, removed her shalwar and committed zina-bil-jabr with her. After the commission of zina, the appellant ran away. When her parents came, she informed them about the incident and then they came to police station for the report.

3. The appellant was arrested, challaned and charge-sheeted firstly under Section 452 P.P.C, secondly under Section 506 P.P.C and thirdly under Articles 6/10(3) of the said Ordinance to which charge the appellant did not plead guilty.

4. To prove its case, prosecution examined four witnesses. Lady Dr. Nageen (PW-1), has deposed that on 21-12-19 at 8.45 PM, she examined the complainant/victim and her findings are reproduced as below:-

"O/E Hymen is intact, there is no laceration, no tear or bleeding. No visible or suspected semen. Her high vaginal swabs taken and handed over to the police for chemical examination. There are few scratches on left leg just above the malleolus four in number. There is no bleeding from them. Only superficial layer of skin is injured. According to her she has changed her clothes."

Mst. Zakia (PW-2), the complainant, has deposed that appellant scalded into her house through an electric pole. He took her

37

to the cattle shed on point of pistol, removed her shalwar, and committed sexual intercourse with her and she became senseless due to tension and fear. Appellant fled away from the place. Her parents returned at 5.00'0 clock and she disclosed about the occurrence. Then she went to the police station accompanied by her father and another person with whom her father is working as a Munshi and lodged the report which has been proved by her as Ex.PA. She has also proved her medical examination for which she was taken by police and her father in the car of a contractor. Her clothes were collected by the S.H.O. Site plan was prepared by S.H.O. at her instance. She had some injury on her left thigh and left leg. Saidul Hassan (PW-3), father of the alleged victim complainant has deposed in confirmity of the contents of FIR Ex.PA. He has proved taking away his victim daughter to the police station in the car of one ~~Abul~~ Kalam. He has also proved Ex.P.C. which ^{is} the memo of recovery of alleged victim's shirt P.1, shalwar P.2, having suspected stains of semen, which were produced to the I.O. He is also a marginal witness to the recovery memo Ex.PC/1 vide which the I.O took into his possession the ^{vaginal} swabs of his daughter. Niaz Muhammad Khan (PW-4), I.O, has proved registration of FIR Ex.PA which was read over and explained to the complainant and her father

both of whom thumb-impressed the said FIR in token of its correctness. He took the complainant to Civil Hospital Swabi for medical examination. He recovered phial containing swabs from lady doctor vide recovery memo Ex.PC/1. Then he went to the place of occurrence, prepared site plan Ex.PB and took into his possession the clothes of alleged victim i.e shirt P.1 and shalwar P.2 having suspected semen stains vide recovery memo Ex.P.C. He arrested appellant on 26-12-1997 and prepared injury sheet Ex.PW-4/2 and referred him to the doctor for medical examination. The clothes and swab of alleged victim were sent to the Forensic Science Laboratory for test and report. The report received is Ex.PK. He recorded statements of PWs. After completing investigation, he handed over the case file to S.H.O who submitted complete challan.

In his statement under Section 342 Cr.P.C, appellant has denied all the specific questions. To a question as to why PWs have deposed against him, he has replied:

"No body except the complainant has deposed against me who is interested in my conviction, on account of rivalry/jealousy."

To another question as to why he has been charged; the reply is:-

"I am innocent and falsely charged because the complainant was in love with me, but instead of her, I married another lady who

deserves my sympathy due to which the complainant got annoyed and fabricated the present case against me."

He has declined to be examined on oath and has not produced witness in his defence.

5. I have heard the counsel for appellant and State.

At the outset, the learned counsel for appellant Malik Rab Nawaz Noon has vehemently contended that there is a clear conflict between the evidence of Mst.Zakia (PW-2), complainant and the only ocular witness, and lady doctor Nagin (PW-1) who examined the complainant medically on 21-12-1997 at 8-45 P.M i.e 4 hours and 45 minutes after the alleged occurrence.

"According to the deposition of this lady doctor the hymen of the victim is intact and there is no laceration, no tear and no bleeding. There is no visible and suspected semen. However, there are few scratches on left leg just above the medial malleolus four in number. There is no bleeding from these scratches and in these scratches only superficial layer of skin is injured."

The same witness has also admitted that these scratches can be self-inflicted even by means of nails, or hard surface. The counsel has made a reference to the conflicting evidence of the alleged victim (PW-2) who has deposed in un-equivocal terms about the removal of shalwar, commission of sexual intercourse and becoming senseless due to tension

and fear. Under these circumstances, the intactness of hymen as reported by the examining doctor is a queer phenomenon specially when the alleged victim has been found adult from her personal appearance and naturally then she was a pubert at the time of the alleged occurrence. Here then I find the following passage from Dr.C.K. Parikh's "Text Book of Medical Jurisprudence and Toxicology" chapter on virginity, pregnancy and delivery as under:-

"The normal hymen lies between these extremes in consistency and structure. It is supplied with blood vessels sufficient to cause recognisable though not severe haemorrhage when it is ruptured. It is not sufficiently distensible to admit the male organ without rupture. In the unruptured state, it barely admits the tip of the little finger. ... The hymen is usually ruptured at the first coitus, and at first only presents a torn appearance."

In the absence of any suggestion concerning the existence of an abnormal elastic hymen, which is very rare phenomenon among nubile virgins, the finding about intactness of hymen of the alleged victim culminates into another finding that the unruptured state of hymen suggests that penetration has not taken place and that upto the time of medical examination no defloration had taken place and that the alleged victim was virgo intacta. On the other hand the alleged victim complainan

PW-2 has shown her age to be about 19/20 years on the date of deposition i.e. ^{on} 2-4-1999, meaning thereby that she was 17/18 years of age at time of alleged occurrence, and has insisted that after removal of her shalwar sexual intercourse was in fact committed with her and she became senseless. Had it been so, then not only the rupture of hymen must have taken place but some sort of tear, laceration or bleeding must have been detected by the examining lady doctor. But about all that the report is negative. So far as four scratches on left leg above the medical malleolus are concerned, the placement of those on human body is such which could not be said to have resulted due to the force used against her for commission of zina-bil-jabr. These scratches could have resulted due to excessive scratching by nails or some other hard substance. The statement of complainant about the commission of offence of zina-biljabr is not inspiring confidence but to another factor as well. During cross, she has denied to have known accused/appellant previously. But then she has also deposed that for the last about 11/12 years their relations with his family were not good. She has further admitted as under:-

"The distance between my house and that of the accused may be one furlong. The accused Aminur Rehman is married with a woman who had divorced by some one and he has kept her in a house and that woman has three children from her ex-husband,

That marriage had taken place some 2 years prior to the present occurrence. That woman is known to me who is not of sound character."

All this means that not only that the appellant was known to her prior to the alleged occurrence, but rather her family affairs were also known to her in the details. This fact is also proved from the nomination of appellant in the very FIR itself. Consequently the credibility of the only eye witness namely the alleged victim is shaken. The rulings in case of this court cited as 1994 P.Cr.LJ 1616 ^u distinguishable from the present case as in the said case Mst. Shagufta Bibi aged 16/17 years ^u had gone to the fields to ease her self, but on her alarm her brother Muhamamd Younus, Manzoor Ahmed and Muhamamd Arif were attracted to the spot and saw the accused running away. In the said case victim was corroborated by three ocular witnesses and her own deposition was inspiring confidence. In the present case, as proved above, the victim is neither inspiring confidence nor is she corroborated by any other witness not even by the lady doctor who examined her. Under such circumstances, the following quotation from a classic on Forensic Science Edited by Cyril H. Wecht Vol. I publication New York 1981 point 1.01 becomes relevant:

"1.01 Admissibility of Expert Opinion

Expert testimony has become such an important factor in many trials, both civil and criminal, that rulings on the

admissibility of such testimony often determine the outcome of the case. There are two fundamental approaches that may be taken in determining the admissibility of expert testimony. One approach, as stated by McCormick, focuses on the subject of the inquiry: if the subject matter of the litigation is beyond the common knowledge of the average person, expert testimony is admissible as necessary to aid the trier of fact in understanding the factⁱⁿ issue. The second approach, espoused by Wigmore, is less restrictive, focusing more on the help-fulness of the expert testimony to the trier of fact rather than on the necessity of that help."

6. Now remains the only factor of positive report of chemical examiner Ex.P.K. According to this report swabs and green coloured shalwar received by the laboratory on 9-2-1998 through FC 717 were stained with semen of human origin. First question which arises is that where were these articles before 9-2-1998. The high vaginal swabs, according to the lady doctor PW-1, were taken and handed over to police on 21-12-1997. On the same date, per memo of recovery Ex.PC, the shirt and shalwar of the alleged victim were obtained before two witnesses out of whom Abdul Kalam has
up.
been given. Another one Saidul Hassan (PW-3), father of alleged victim, is an interested witness. Niaz Muhamamd Khan (PW-4), ASI and I.O of the case has admitted as under which admission itself is enough to create suspicion into the safe custody of

the articles about which chemical examiner's report is patently positive:

"In fact, I had delivered the clothes and swabs of the complainant to the Moharrir of the PS alongwith my application Ex.PW-4/3 on 23-12-1997. I do not know, as to when, the Moharrir of the PS, dispatched/sent the articles to the FSL, for analysis. I have not recorded the statement of the Moharrir of the police station. The articles were received in the laboratory on 9.2.98 whereas the result thereof was recieved in the PS on 12.9.98."

Moharrir, to whom I.O (PW-4) is referring, is neither examined nor even named. Report of Serologist is also absent. Under such conditions, it is not established beyond reasonable doubt that the detected semen had its origin either from the appellant or from the vaginal swabs of the alleged victim. These articles remained with the unidentified moharrir for about 1½ months. Naturally then the safe custody of these articles cannot be said to be out of the scope of doubt.

In view of the above discussion, I had come to the conclusion that prosecution has failed to prove its case beyond reasonable doubt. I had set aside the impugned judgment, accepted the appeal and acquitted the appellant
all
Amin-ur-Rahman @ Malangai s/o Ali Rahman from the charges

Cr.A.No.82/I/1999

- 12 -

through my short order. These are the reasons for the
said order.

(Abdul Waheed Siddiqui)
Judge

Approved for reporting

Islamabad, the
7th July, 1999.
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